limitation in brackets, "being a liability covered by the terms of the policy". The law as to the insurers' statutory obligation towards third parties is set out in paragraph 769 on page 375 of 22 *Halsbury* (3rd Ed.) as follows:—

"The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of a liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a person falling within the limited class of third parties whose bodily injury or death is required to be covered by a motor policy. The third condition is that the liability is in fact covered by the terms of the policy or would be covered by the policy but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy."

Such being the case, it follows that the respondent's remedy must be sought through subrogation to the rights of the insured against the appellants, with the result that, where the policy contains an arbitration clause, the respondent as injured third party is bound by it as being a person "claiming through or under" the insured. The appellants accordingly should be entitled to a stay of proceedings under section 5 of the Arbitration Ordinance 1950. I would allow this appeal with costs here and in the court below.

Suffian F.J.: I have had the advantage of reading in advance the judgment of my Lord Chief Justice. I respectfully concur with his conclusion and reasons and have nothing to add.

Abdul Aziz J. concurred.

Appeal allowed.

Solicitors, *Dharmananda & Co.; N. Sharma.*

GAN KIM THYE v. THE UNION OMNIBUS CO., LTD.

[O.C.J. (Abdul Hamid J.) January 29, 1969]
[Seremban — Civil Suit No. 90 of 1967]

Damages — Personal injuries — Negligence — Breach of statutory duty — Bus conductor working more than a total of 80 hours a week — Employment Ordinance, 1955, ss. 58 and 59(1).

Master and Servant — Bus conductor working more than 48 hours a week — Whether breach of Employment Ordinance, 1955, s. 59.

This was a claim for damages for personal injuries sustained by the plaintiff who was employed as a bus conductor by the defendants. The plaintiff alleged that the injuries were caused by the negligence or alternatively by tht breach of statutory duty of the defendants, their servants or agents. This allegation was based on the fact that the plaintiff worked for more than six days in a week and a total of 80 hours a week in breach of sections 58 and 59(1) of the Employment Ordinance, 1955. As a result the plaintiff alleged that he had a stroke as a result of which he suffered paralysis of the left half of his body. The medical evidence was to the effect that the plaintiff suffered from a natural disease which had no relationship to his occupation.

Held: (1) there was no breach of any statutory duty on the part of the defendants or their servants or agents in this case but even if there had been a breach of statutory duty, the plaintiff had not proved that the injuries sustained by him were as a result of or caused by such breach;

(2) the plaintiff has failed to prove that the injuries sustained by him were caused by the negligence of the defendants.

Cases referred to:—

(1) *Bonnington Castings Ltd.* v. *Wardlaw* [1956] 1 All E.R. 615.

(2) *Golden Hope Rubber Estate Ltd.* v. *Muniammah & Ors.* [1965] 1 M.L.J. 5.

(3) *Crookall* v. *Vickers Armstrong Ltd.* [1955] 2 All E.R. 12.

(4) *Clarkson* v. *Modern Foundaries Ltd.* [1958] 2 All E.R. 33.

(5) *Nolan* v. *Dental Manufacturing Co. Ltd.* [1958] 2 All E.R. 449.

(6) *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 166.

(7) *Smith* v. *Baker & Sons* [1891] A.C. 325 at p. 362.

CIVIL SUIT.

Atma Singh Gill for the plaintiff.

N.A. Majoribanks for the defendants.

Cur. Adv. Vult.

Abdul Hamid J.: This is a claim for damages for personal injuries sustained by the plaintiff who was employed by the defendants as a bus-conductor. The plaintiff alleges that the injuries were caused by the negligence or alternatively by the breach of statutory duty of the defendants, their servants or agents. Briefly, the facts were that on 10th April, 1965 the plaintiff while at work had a stroke as a result of which he suffered paralysis of the left half of his body. The plaintiff, 46 years old, was employed by the defendants since 1947 and was paid $8 per day. As a bus-conductor he had to sell tickets to passengers; look after the safety of passengers when boarding on and alighting from the bus; account for the fares collected; keep and maintain records of the tickets sold and to load and unload, passengers' luggage, vegetable baskets and bicycles on the hood of the bus.

The plaintiff in paragraph 3 of the statement of claim alleges that he had to work from 6.30 a.m. to 6.00 p.m. without a day of rest in a week, a total of 80 hours a week in breach of section 58 of the Employment Ordinance, 1955. Counsel for the plaintiff contended that there was a breach of statutory duty on the part of the defendants and that it was as a result of this breach that the plaintiff suffered injuries. The learned counsel also submitted that by working more than 48 hours in a week there was also a breach of section 59 of the Employment Ordinance. Counsel for the defendants,

on the other hand, submitted that there was no breach of any statutory duty on the part of the defendant as sections 58 and 59 of the Employment Ordinance did not prohibit a labourer from working more than six days or more than 48 hours a week. He urged the court to consider the fact that the plaintiff was a daily-paid labourer and, if he did work more than six days or more than 48 hours in a week, it was entirely a voluntary act on the part of the plaintiff. In any event the defendants never required the plaintiff to work daily against his wish. The plaintiff was free to take leave on any day without pay.

Section 58 and section 59(1) of the Employment Ordinance reads as follows:—

"58. No labourer shall be required to work on more than six days in any one week.

59. (1) No labourer, other than a shift worker as hereinafter defined, shall be required to work for more than forty-eight hours in any one week:

Provided that any labourer may be required to work for more than forty-eight hours in one week in the case of accident, actual or threatened, or in case of urgent work to be done to electrical installations or machinery, or in case of an interruption of work which it was impossible to foresee and which is not of a recurring character, but only in so far as may be necessary to avoid serious interference with the ordinary working of the undertaking concerned."

It seems to me that having regard to the words "shall be required" used in section 58 it is reasonable to construe that though a labourer shall not be required by the employer to do so the labourer may, however, agree to work more than six days in a week.

It also appears that a labourer, though entitled to take a day off, may voluntarily forgo his leave and elect to work in which case it is unreasonable to say that he was in the circumstances required by the employer to work more than six days in a week. Thus it is unreasonable to say that there was a breach of statutory duty on the part of the employer. In my view an employer owes no duty to prohibit a labourer if he so elects to work more than six days in a week. It seems to me that section 59(1) of the Employment Ordinance also places no absolute limitation on the part of the labourer to work more than 48 hours in a week and there appears to be no prohibition against an employer to employ a labourer who voluntarily elects to work more than 48 hours a week. My finding may perhaps be strengthened by the fact that the Ordinance itself provides no penalty against any contravention of either section 58 or section 59(1) of the Ordinance.

In the present case the defendants did not dispute that the plaintiff did work more than 48 hours and more than six days in a week. The plaintiff also admitted that he took leave off and on and for the day he was on leave he was not paid. This arrangement was accepted and agreed upon by both the plaintiff and the defendants, at any rate, there was no evidence for me to hold otherwise. There was also no evidence for me to conclude that at some time or other the plaintiff repudiated this arrangement. It is plain that in consideration of a daily wage of $8 per day the plaintiff carried out the work from 6.30 a.m. to 5.30 p.m. (not 6.00 p.m. as alleged in the statement of claim) daily. The fact that the work was done throughout the material period with full agreement of the plaintiff forced me to the conclusion that there is in the circumstances no breach of any statutory duty on the part of the defendants.

Assuming that I am wrong and it is argued that there is a breach of statutory duty on the part of the defendants, the plaintiff has not, in my opinion, proved that the injuries sustained by him were as a result of or caused by such breach The onus of proof is on the plaintiff. In *Bonnington Castings Ltd.* v. *Wardlaw* [1] (House of Lords), the facts were that —

"The respondent, who had worked for eight years in the dressing shop of a foundry producing steel castings owned by the appellants, contracted pneumoconiosis through inhaling air which contained silica dust. The main source of this dust was from pneumatic hammers, one of which the respondent operated, but, throughout the material period, there was no known protection against dust produced by the operation of such a hammer. Part of the dust, however, which polluted the atmosphere which the respondent inhaled, came from operations conducted at swing grinders, as a result of the dusts of dust-extraction plant for these grinders not being kept free from obstruction as provided by reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925. The appellants admitted that they were in breach of this regulation, but maintained that, as there was no evidence to show the proportions of dust emanating from the various sources of dust in the dressing shop, the respondent could not show that the dust from the swing grinders contributed materially to the dust inhaled by him."

It was held that the proportion of dust coming from the swing grinders and inhaled by the respondent had been shown on the evidence not to have been negligible and had contributed materially to his contracting pneumoconiosis.

On the question of onus of proof Lord Reid at page 618 said:—

"It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused, or materially contributed to, his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown

to be possible that his injury may have been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury."

In this case the medical evidence reveals that the plaintiff was suffering from posterior inferior cerebellar artery thrombosis (arterial disease). The State physician, General Hospital, Seremban, Dr. S.R. Christopher, who examined the plaintiff, issued a certificate stating that in his opinion the plaintiff suffered from a natural disease which had no relationship to his occupation. (see page 1 of Exhibit P.1). According to the doctor, a stroke could happen at any time and could have occurred totally unforeseen. He added that the stroke is caused by clotting of blood in the brain and this could occur at any time unexpectedly. The plaintiff suffered from arterial disease, that is disease in which arteries are thickened and limen narrowing, and this arterial disease is a natural disease and it occurs gradually. Any form of exertion can cause occlusion of the artery and to a person suffering from arterial disease any form of exertion can precipitate an acute occlusion so that a part of the body distalled to this occlusion would suffer damage.

The learned counsel for the plaintiff contended that the injuries arose out of and in the course of the employment. In support of this contention he cited the case of *Golden Hope Rubber Estate Ltd.* v. *Muniammah & Ors.*[2] where it was held that:—

"Where the death of a person from disease is accelerated by some particular act of exertion, the death can properly be said to be caused by an accident and where the contributory cause is furnished by and in the course of an injured workman's employment, he is entitled to compensation under the Ordinance."

I have considered the various cases cited in this case as to the meaning of the words "injury by accident" and the question before me is: did the stroke suffered by the plaintiff arise out of and in the course of the plaintiff's employment? This I think is a question of fact. In my considered opinion having regard to the circumstances of this case and in particular the medical evidence, the injury suffered by the plaintiff could not in all probabilities be said to be caused by an accident arising out of and in the course of the plaintiff's employment. The State physician, who examined the plaintiff, certified that the plaintiff was suffering from the disease described by him as posterior inferior cerebellar artery thrombosis and, in his opinion, this man suffered from a natural disease which had no relationship to his occupation. And on 14th April, 1967, replying to a letter sent to him by counsel for the plaintiff dated 31st March, 1967, (see pages 6 and 4 of P.1) Dr. Christopher stated that, "In view of the circumstances during the onset of Mr. Gan Kim Thye's symptoms I am of the opinion that his illness was accelerated by the effort involved." This appears to a small extent to conflict with the certificate (page 1 of P.1) issued by him. In court, however, Dr. Christopher in answer to cross-examination by the defendant's counsel stated that he still sticks to the opinion given in the certificate with a slight modification. He said that

"The doctor in Kuala Pilah had not mentioned that a stroke occurred during the course of the plaintiff's duties. So I thought that this occurred in his natural state. I issued my medical certificate that this was a natural disease with no relationship to his occupation."

The doctor added that he knew the plaintiff was employed as a bus-condutor because he asked the plaintiff whether he was working at the time of the stroke and the plaintiff said "Yes". In re-examination the doctor emphasised that a stroke could happen any time totally unforeseen. He explained that when he said a natural disease he meant a disease where no physical violence was involved. In answer to the question put by the court he further explained that this is a stroke caused by clotting of blood in the brain and this could occur at any time unexpectedly. He also clarified that the arterial disease is a natural disease and it occurs gradually and any form of exertion can cause occlusion of the artery. In the circumstances I find that the doctor was fully aware of the fact that the plaintiff was a bus-conductor and that it occurred while the plaintiff was at work. I also find that on the balance of probabilities that the stroke suffered by the plaintiff was not caused by a particular act of exertion arising out of and in the course of the plaintiff's work on that day. The doctor said that it could even happen in his sleep.

From the evidence I find that the defendants could not reasonably have known that there was any possible risk of the plaintiff having a stroke on account of the work undertaken and it is evident that the plaintiff himself had no reason whatsoever to believe that he would run the risk of having a stroke. In the plaintiff's own words he stated that he never had any headache before 9th April, 1965, and there was not the slightest evidence to show that he had ever suffered any illness or disease. Further, it has never been known that a workman engaged as a bus-conductor is generally exposed to posterior inferior cerebellar artery thrombosis.

In the light of the medical evidence I am satisfied that, though it is established that the plaintiff had a stroke while at work, I am however, unable to hold that the injuries were caused by the breach of the statutory duty on the part of the defendants, nor can I hold that

the injuries arose out of or in the course of the the plaintiff's employment. It is my view, therefore, that having regard to the circumstances of the case, the plaintiff fails on this head having failed to prove that the defendants' breach of statutory duty materially contributed to the injury complained of.

The present case can be distinguished from the case of *Crookall* v. *Vickers-Armstrong, Ltd.* —[3]

"Where the plaintiff, who had contracted silicosis during his employment as a moulding machinist in the defendant company's steel foundry, claimed damages against the company for personal injuries occasioned to him by the company's negligence and/or breach of statutory duty. The medical evidence showed that the disease was caused by his having inhaled silica particles arising from the work done in the foundry. The question before the court was whether the defendant company ought to have appreciated the risk and, if so, once the risk had been appreciated ought not greater efforts be made by the company to provide masks, and to see that the workmen, including the plaintiff, used them? Glyn-Jones J. held that 'Once an employer knew or ought to have known that his workmen were exposed to a material risk of contracting a serious disease and that the risk could be diminished, if not eliminated, by the wearing of masks, it was his duty to take all reasonable steps, by clearly warning the men that they refrained at their own risk from wearing the masks, and, by encouragement and exhortation, to seek to persuade them to do so.'"

In the present case, the defendants had no means of knowing that the plaintiff would probably be exposed to a risk of having a stroke. And in *Clarkson* v. *Modern Foundries, Ltd.* —[4]

"The plaintiff suffered from pneumoconiosis contracted during his employment. It was held that the exposure to dust materially contributed to his illness."

Bonnington Castings, Ltd. v. *Wardlaw, supra,* was applied.

The plaintiff alternatively alleges that the negligence of the defendants caused injuries sustained by him. Following the principle laid down in *Bonnington's* case, *supra,* the onus of proving that the fault complained of caused, or materially contributed to the injuries, lies on the plaintiff. (See *Nolan* v. *Dental Manufacturing Co. Ltd.*[5] where *Bonnington's* case was applied). In *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.,*[6] it was held that action in respect of injuries caused by breach of statutory duty does not differ from an action in respect of injuries caused by any other wrong (*per* Lord Atkin). In considering the common law duty I should like to quote the words of Lord Herschell in *Smith* v. *Baker & Sons* [7] at page 362:—

"It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk."

In the present case the same general approach which leads me to think that the injuries suffered by the plaintiff were not caused or contributed to by the breach of the defendants' statutory duty leads me to hold that the plaintiff also fails at common law. The plaintiff did not, in my opinion, establish that there was a risk to work more than six days or more than 48 hours in a week. I am unable to conclude from the mere fact that the plaintiff had worked for more than six days or more than 48 hours in a week that there was an unnecessary risk and, that being the case, I am unable to arrive at a finding that there was any failure on the part of the defendants to take reasonable care to protect the plaintiff from any unnecessary risk. The plaintiff also entirely fails in my judgment to show that it was reasonably practicable for the defendants devoid of any knowledge or reason to believe that the plaintiff was suffering from arterial disease to make any effort to avoid causing of an injury or to take any other preventive measures. It is therefore my opinion that the injuries sustained by the plaintiff were not as a result of any failure or negligence on the part of the defendants. In other words the plaintiff has failed to prove that the injuries sustained by him were caused by the negligence of the defendants.

The plaintiff also alleged that on the morning of 9th April, 1965, he was feeling ill and applied for leave from the supervisor. The evidence was adduced to show that he did so some time past 11.00 a.m. on that day, that is after he had arrived at Kuala Pilah from Bahau. The defendants, however, denied that the plaintiff ever asked for leave. I have considered the evidence of the various witnesses on this point and, in the light of the evidence as a whole, I am inclined to accept the evidence of the plaintiff that he had applied for leave on the 9th of April, 1965. However, I am not satisfied on the balance of probabilities that the plaintiff did in fact apply for leave on the 10th. It is probable that, having been refused leave on the 9th, the plaintiff did not think it worthwhile to ask for leave on the 10th. In any event I think there was ample justification on the part of the defendants' supervisor in this case to refuse leave without the plaintiff producing any medical certificate. Even assuming that the plaintiff did in fact ask for leave on the 10th and that the defendants' supervisor refused leave he could not under the circumstances as a reasonable and prudent person have known that there was a risk of exposing the plaintiff to having a stroke. In all probabilities and judging from the circumstances of this case, in particular the medical evidence, the headache complained of was probably due to the arte-

rial disease suffered by the plaintiff for which the defendants did not know and could not reasonably have known. It is my opinion therefore that the plaintiff failed to show that the injuries sustained by him was due to the fault of the defendants. It is manifest from the medical evidence that the plaintiff suffered from the arterial disease, a natural disease which occurs gradually, and that any form of exertion may cause the thickening of the arteries and as a result of which a stroke could happen at any time even in his sleep.

In my judgment the plaintiff failed to prove that the injuries sustained were caused by the defendants' breach of statutory duty or their negligence. The claim is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Atma Singh Gill & Co.; Lovelace & Hastings.*

LAU SIENG NGUONG v. HAP SHING CO. LTD.

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & MacIntyre F.J.) January 30, 1969]

[Kuching—Federal Court Civil Appeal No. X. 10 of 1968]

Contract — Contract evidenced by correspondence — Whole correspondence to be looked into.

The respondents claimed damages from the appellants for breach of a contract to supply 2,000 tons of *MLH* logs to them. To prove the existence of the contract the respondents relied on the correspondence between the parties which included:— (i) the appellant's offer to supply logs at $37 per ton; (ii) the respondents' acceptance of the offer, and that they required 2,000 tons of logs; (iii) the appellant's instructions that payment should be by letter of credit.

The appellant subsequently withdrew his offer to sell at $37 per ton, and made a new offer of $40 per ton which was refused by the respondents. The appellant in his defence, denied that there was a concluded contract between them. In an appeal from the judgment of the High Court awarding $6,000 damages to the respondents,

Held, dismissing the appeal: (1) where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement;

(2) in this case the trial judge was right in holding that there was a binding contract between the parties.

Cases referred to:—

(1) *Hussey* v. *Horne Payne* (1879), 4 App. Cas. 311.

(2) *Bristol Cardiff & Swansea Aerated Bread Co.* v. *Maggs* (1890), 44 Ch.D. 616.

(3) *May* v. *Thomson* (1882), 20 Ch.D. 705, 723.

(4) *Lau Brothers & Co.* v. *China Pacific Navigation Co. Ltd.* [1965] 1 M.L.J. 1.

FEDERAL COURT.

Appellant in person.

C.T. Wong for the respondents.

Ismail Khan C.J. (Borneo): The respondents claimed damages from the appellant which it was alleged in the statement of claim arose from a breach by the appellant of a contract to supply 2,000 tons of *MLH* logs to them. In his defence the appellant denied that there was any concluded contract between them.

At the trial certain agreed documents were tendered and the court was invited to decide from these whether there was a contract between the parties. In the event the learned judge, having considered the documents, held that there was a contract, and gave judgment for the respondents in the agreed sum of $6,000. This is an appeal against the decision of the learned judge.

The action arose in the following circumstances: On the 9th of September 1965 the appellant received a telegram A.1 from the respondents requesting a quotation as to the price of *MLH* logs. The telegram reads:—

"1500/2000T VESSEL AVAILABLE LOADING FIRST HALF OCTOBER PLEASE QUOTE YOUR LOWEST FOB PRICE FOR MLH LOGS".

and the appellant's reply A.2 was as follows:—

"YC9 BEST MALAYAN 37 FOB CONFIRM".

On the 10th of September the respondents accepted the offer by telegram A.3 in these terms:—

"YC10 ACCEPTED 2000T *MLH* LOGS MUST GUARANTEE FRESH CUT GIRTH 36" UP LENGTH 12 UP WILL ADVISE SHIP ETA".

The appellant then sent the following telegram A.4:—

"YC11 PLEASE CABLE CREDIT IMMEDIATELY AND CABLE NAME STEAMER ETA REPLY".

On the 13th of September the respondents cabled as follows A.5:—

"YC12 CREDIT OPENING SANDAKANBAY ETA 15/20 OCTOBER".

The appellant followed up the last telegram with a letter in Chinese (Exh.A.15) dated 15th September 1965 the translation of which reads:—

"Sir,

I acknowledge receipt of your 2 telegrams for which I thank you for placing an order of 2,000 tons of mixed logs. You have also booked Sandakan Bay to come to take the delivery of logs by the middle of next month. I was very grateful to you for all the arrangements you have made. It was hoped that your company is satisfied with the goods supplied. As we have business to deal with each other as from this occasion it is hoped that we shall have more business association in future.